

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL D. MICHAEL, et al,

Plaintiffs,

vs.

CIVIL ACTION NUMBER 1:14CV212

THE ESTATE OF ALEX  
KOVARBASICH, et al,

Defendants.

- - -

Proceedings had in the Telephonic Status Conference of  
the above styled action on October 5, 2015, at 1:00 p.m.,  
before The Honorable Irene M. Keeley, Judge, at Clarksburg,  
West Virginia.

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Proceedings recorded by stenomask, transcript produced by  
official court reporter.

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**I N D E X**

**WITNESSES**

**DIRECT   CROSS   REDIRECT   RECROSS**

(No Witnesses Called)

1 P R O C E E D I N G S

2 (10-05-2015, 1:00 o'clock p.m., via telephone)

3 THE COURT: Good afternoon. This is Judge Keeley.  
4 Do I have everyone on the line?

5 MALE SPEAKER: I believe so.

6 THE COURT: All right. Let me call the case. This  
7 is the case of Michael, et al versus the Estate of  
8 Kovarbasich, et al, 1:14CV212.

9 Would counsel, beginning with the plaintiffs, please  
10 note their appearance?

11 MR. SEGAL: Scott Segal on behalf of the  
12 plaintiffs, Your Honor.

13 THE COURT: Okay.

14 MR. HRKO: Sam Hrko on behalf of the plaintiffs,  
15 Your Honor.

16 THE COURT: Okay.

17 MR. BARNEY: Mark Barney on behalf of the  
18 plaintiffs.

19 MR. SHAFFER: Steve Shaffer on behalf of the  
20 plaintiffs.

21 MR. ESTEP: Paul Estep on behalf of the plaintiffs.

22 MR. ZURBUCH: Pete Zurbuch on behalf of the  
23 defendant Kovarbasich.

24 MR. ROBINSON: Bill Robinson on behalf of defendant  
25 Consolidation Coal Company.

1 MR. JEVICKY: John Jevicky on behalf of defendant  
2 Consolidation Coal Company.

3 MR. MOORE: Michael Moore on behalf of defendant  
4 Consolidation Coal Company.

5 MR. WITT: Jason Witt, in-house counsel for  
6 defendant.

7 MR. NET: Cody Net, in-house counsel for defendant.

8 THE COURT: All right. Mr. Witt and Mr. Net, I  
9 assume that the defendant is Consolidation Coal Company.

10 MR. WITT: Yes.

11 THE COURT: All right. Have either of you noted an  
12 appearance in the record in this case?

13 MR. WITT: No.

14 THE COURT: All right. So I assume you're  
15 attending to listen in, not to participate?

16 MR. WITT: That is correct.

17 THE COURT: All right. Thank you very much. I  
18 appreciate your letting me know that you're on the line and  
19 I would go back and ask, of the plaintiffs' attorneys who is  
20 leading for purposes of the discussion today?

21 MR. HRKO: Sam Hrko, Your Honor.

22 THE COURT: All right. Thank you, Mr. Hrko. And  
23 who is leading for the defendant Consolidation Coal Company?

24 MR. ROBINSON: Your Honor, this is Bill Robinson.  
25 I will be.

1           THE COURT: Okay. Thank you. As I see it, and  
2 please tell me if you think I'm wrong about this, I believe  
3 we're going to discuss two issues. The first is whether a  
4 further stay of proceedings is appropriate pending what I  
5 understand to be the plaintiffs' appeal--intent to appeal  
6 Judge Marks' ruling to the West Virginia Supreme Court and  
7 then the second issue would be how to proceed with any  
8 objections to the memorandum opinion and recommendation of  
9 Magistrate Judge Kaul that came down last week, on the  
10 29th. Are those the issues that you have as well identified  
11 or do you think there are further issues that I should note  
12 for the docket here today?

13           MR. HRKO: Your Honor--

14           MR. ROBINSON: Your Honor--

15           MR. HRKO: Go ahead, Bill.

16           THE COURT: We'll start with--

17           MR. ROBINSON: Okay. If--

18           THE COURT: Let's do Mr.--Mr. Hrko, Mr. Zurbuch and  
19 Mr. Robinson, in that order. That would be probably best.

20           MR. HRKO: Okay. Your Honor, Sam Hrko here. We do  
21 agree that those two issues are applicable.

22           The other issue that might be a subset of one of those  
23 is how we proceed with pending discovery at the same time.

24           THE COURT: Okay.

25           MR. ZURBUCH: Your Honor, Pete Zurbuch. I would

1 agree.

2 MR. ROBINSON: Your Honor, Bill Robinson. The only  
3 other issue that we may want to discuss relates to your  
4 recent order appointing Magistrate Judge Aloï to replace  
5 Magistrate Judge Kaul1 in the case. Judge Aloï has--while  
6 he was sitting as a Circuit Judge in Marion County first  
7 received this case when it was filed in state court and he  
8 recused himself at that time due to conflict of interest. I  
9 believe he had one or more relatives who were killed in the  
10 mine that is at the center of this case.

11 THE COURT: Okay.

12 MR. ROBINSON: We've not filed a motion to recuse  
13 Judge Aloï but I just wanted to bring that to your  
14 attention. It may be something--

15 THE COURT: All right. I think what you're  
16 referring to is the fact that upon Judge Kaul1's retirement  
17 and Judge Aloï becoming the--the new Magistrate Judge at  
18 this point of holding court, the Clerk's Office  
19 automatically referred all pending discovery disputes for  
20 purposes of a standing order to him and I think it would  
21 probably be appropriate if--in light of what you just told  
22 me to go ahead and make that motion to him so that he can  
23 take a look at that and then as he determines, I can take a  
24 look at it. Okay?

25 MR. ROBINSON: All right. I understand.

1           THE COURT: I don't think it would be appropriate  
2 for me just to tell Judge Aloï you can't do this because  
3 they raised an oral complaint or an oral concern. I would  
4 rather that you just go ahead and note it in writing to him  
5 and let him take appropriate action first. If you have a  
6 problem with what--you know, if he recuses himself,  
7 obviously we'll appoint another Magistrate Judge to handle  
8 any discovery disputes. Okay?

9           MR. ROBINSON: I will do that, Your Honor. Thank  
10 you.

11           THE COURT: I was unaware of--I probably should be  
12 aware but I was not aware or was--my recollection wasn't  
13 refreshed that he recused himself in the state court case  
14 but I can well understand why. I believe he had family  
15 members who were impacted. In fact, I believe he had  
16 decedents in that--from that explosion, correct?

17           MR. ROBINSON: That's my understanding; yes.

18           THE COURT: Okay. Fine. So I think we can handle  
19 the Judge Aloï situation that way and--

20           MR. ROBINSON: Okay.

21           THE COURT: And what I would like to do then is to  
22 take up first, with Mr. Hrko I think starting it,  
23 whether--what the status of any further proceedings in this  
24 case should be given the--have you already filed your appeal  
25 of Judge Marks' ruling or is that something you intend to be



1 doing?

2 MR. HRKO: We--Your Honor, we have not yet filed  
3 the appeal. It's my understanding we have 30 days from the  
4 date the order was entered to do so and--and we do intend to  
5 follow through with that.

6 THE COURT: Okay. And by the way, I want to--you  
7 know, tell you all I apologize for not knowing that Judge  
8 Marks had entered that opinion on September 21st. No one  
9 forwarded that to me and I didn't--as a matter of course I  
10 would not get rulings from the Circuit Court so--I guess  
11 once I entered my order staying the case waiting for his  
12 order, you all forwarded that to us, correct?

13 MR. HRKO: Correct, Judge. It kind of happened a  
14 little crazy. I don't think Consol and the other defendants  
15 actually saw it before the Court entered the stay order but  
16 I think plaintiffs' counsel did see it before you entered  
17 the stay order so it just--the timing of it was kind of  
18 confusing for everyone.

19 THE COURT: Okay. All right. Well we can clear  
20 that up today. What is it that you're seeking to do and  
21 what is it that you want me to do?

22 MR. HRKO: Your Honor, we would ask that the Court  
23 simply stay the proceedings until we run this--this issue to  
24 its completion in front of the Supreme Court of Appeals of  
25 West Virginia.

1 THE COURT: Stay the whole case?

2 MR. HRKO: Correct.

3 THE COURT: All right. So stay all proceedings  
4 until this--this is run by and you have--see--now is this a  
5 decision by Judge Marks that you think is immediately  
6 appealable or are you seeking a--an interlocutory? I assume  
7 since he's removed it from the docket it's--it's--it's a  
8 closed case for him, right?

9 MR. HRKO: That would be my understanding, Your  
10 Honor.

11 THE COURT: Okay. All right. So stay everything  
12 over here pending a decision by the State Supreme Court on  
13 Judge Marks' ruling from September 21st, 2015. Mr. Zurbuch,  
14 does your client have a position on this?

15 MR. ZURBUCH: No, Your Honor, really doesn't. I  
16 would say this that obviously if the case isn't stayed we'd  
17 be following it up with a motion to dismiss, which I think  
18 would likely have to be granted and I can understand the  
19 plaintiffs' desire to stay it. It does make some difference  
20 to Kovarbasich in the event the Supreme Court would reverse  
21 Marks.

22 THE COURT: Yes, of course. Okay. What about  
23 Consolidation Coal Company, Mr. Robinson?

24 MR. ROBINSON: Your Honor, in view of Judge Marks  
25 September 29 order which vacated the Harrison County

1 Commission's appointment of Sheriff Marano as Administrator  
2 of the Kovarbasich Estate and ordered that the estate be  
3 immediately closed, it no longer exists as a legal entity.  
4 The estate can't remain a named non-diverse defendant and we  
5 think obviously it's been fraudulently joined in the case.  
6 It would be--it is our preference and we think the Court  
7 should now rule on the motion to remand regardless of  
8 whether plaintiffs appeal Judge Marks' decision to the  
9 Supreme Court of Appeals of West Virginia. That motion must  
10 be denied on the basis of Judge Marks' order alone, but as  
11 the Court is aware Consolidation Coal Company has made  
12 additional, equally persuasive arguments demonstrating  
13 fraudulent joinder of Kovarbasich as being wholly separate  
14 and apart of the issues addressed by Judge Marks.

15 For example, Judge Kaull found in his September 29  
16 decision that indeed the two-year limitations applied and  
17 that under the law that existed in 1968 and for many years  
18 thereafter, neither the discovery rule nor fraudulent  
19 joinder can be applied to toll the two year limitations.

20 So we think clearly, in dealing with the motion to  
21 remand, separate and apart from the issue addressed by Judge  
22 Marks', this Court is in position to rule that the  
23 plaintiffs' claims are barred by the two-year limitation.

24 THE COURT: All right. Now let me just see if I  
25 can parse that out a little bit more, Mr. Robinson. The

1 Kovar--how did you pronounce it, Mr. Zurbuch, Kovarbasich?

2 MR. ZURBUCH: Yeah. That's how I pronounce it.

3 That's not necessarily correct though but--

4 THE COURT: It's your client so I'll--I'll go with  
5 your pronunciation. Your--Judge--Judge Marks' ruling  
6 pertained only to the Estate of Alex Kovarbasich. The  
7 ruling from Judge Kaull dealt with--or the recommendation  
8 from Judge Kaull dealt with a motion for leave to amend the  
9 complaint to add Leonard Sacchetti and it also related to  
10 other motion practice pertaining to testimony of  
11 Mr. Layne--Lawrence Layne, correct? So--

12 MR. ROBINSON: That's what Judge Kaull did, yeah.

13 THE COURT: Yeah. I'm trying, Mr. Robinson, to  
14 understand what you're--what you're trying to tell me about  
15 the relationship between the ruling of Judge Marks on  
16 Kovarbasich and the recommendation of Judge Kaull with  
17 regard to Sacchetti and Layne.

18 MR. ROBINSON: Well in the motion to remand, Your  
19 Honor, it is our contention that plaintiffs have  
20 fraudulently joined the Kovarbasich Estate in part because  
21 they cannot possibly establish a claim against the estate in  
22 state court on grounds that their claims are barred by the  
23 two-year limitations.

24 THE COURT: Well, that--and if--and if Judge Marks'  
25 ruling is upheld by the--affirmed by the state Supreme Court

1 that would definitely be the case but I don't think--I am  
2 trying to figure out that that has anything to do with the  
3 motion--the pending motion to amend.

4 MR. ROBINSON: Because the issues are the same in  
5 the motion to remand and Consolidation Coal Company's motion  
6 to dismiss. That argument--

7 THE COURT: Wait a minute.

8 MR. ROBINSON: --is the--

9 THE COURT: We don't have--we don't have--we don't  
10 have Sacchetti or Layne in the case right now. The case--I  
11 thought the case was teed up on fraudulent joinder and the  
12 issue--all the issues that relate to--or that issue is  
13 related to Judge Marks' ruling on whether the entity could  
14 be brought in at this time. He didn't say anything about  
15 the issues addressed by Judge Kaull, right?

16 MR. ROBINSON: That's correct. What I am saying,  
17 Your Honor, is there are--are six or seven different  
18 arguments in opposition to the motion to remand. The  
19 primary argument relates not to the estate, that was an  
20 issue being determined in state court. The primary issues  
21 relate to the statute of limitations. The decision by Judge  
22 Kaull, if adopted by--by you would have equal application to  
23 the motion to remand and the motion to dismiss; that is, as  
24 to all of the claims in this case. They're barred by the  
25 two year limitation within the discovery rule and

1 fraudulent--fraudulent representation simply does not apply  
2 to toll that limitation period. So that--that's the  
3 connection I'm trying to make.

4 THE COURT: What I think you're saying is that this  
5 case is actually proceeding on a couple of different, not  
6 necessarily parallel tracks, but the one involving  
7 Kovarbasich and then the issues of whether the motion to  
8 amend is fruitless or ought to be granted and that is  
9 separate and distinct and really unrelated to the  
10 Kovarbasich issue but you're saying this is all part of  
11 Consol's overarching argument as to why the case should not  
12 be remanded?

13 MR. ROBINSON: That's right. And we believe the  
14 motion to remand and the motion to dismiss can be ruled upon  
15 and this case can be disposed of regardless of what the  
16 Supreme Court of West Virginia might do with the appeal in  
17 the Marks' ruling.

18 THE COURT: I think that's where I'm coming up a  
19 little short. Even if I were to agree with Judge Kaull with  
20 regard to not letting the plaintiffs amend to add  
21 Mr. Sacchetti--Sacchetti, excuse me, explain to me how that  
22 also takes care of the issue relating to Alex Kovarbasich's  
23 Estate.

24 MR. ROBINSON: It doesn't and that's not what I'm  
25 trying to say, Your Honor.

1 THE COURT: Okay.

2 MR. ROBINSON: But what I'm--what I'm trying to say  
3 is we have--we have three different things going on here.  
4 We have the state court decision by Judge Marks that  
5 apparently is going to be appealed to the Supreme Court;  
6 that's one. Separately we have the recommended decision by  
7 Judge Kaull; that's two and three, and I guess we can say  
8 three and four, when this Court had issued its stay back in  
9 April, what it said is it was going to stay any further  
10 ruling on the motion to remand and Consolidation Coal  
11 Company's motion to dismiss pending Judge Marks' ruling.

12 THE COURT: Uh-huh (yes).

13 MR. ROBINSON: That ruling has now been entered.  
14 But separate and apart from the issues that Judge Marks  
15 ruled upon, this Court can look at the other issues  
16 addressed in the motion to remand and the memorandum in  
17 opposition to that motion and can look at the issues  
18 addressed in Consolidation Coal Company's motion to dismiss  
19 that have nothing to do with Judge Marks' decision and--

20 THE COURT: Well, but--

21 MR. ROBINSON: And--and--

22 THE COURT: But you--

23 MR. ROBINSON: And the appeal and if the Court  
24 disposes of the case on the motion to dismiss, which doesn't  
25 relate to Mr. Kovarbasich. It should only relate to

1 Consolidation Coal Company, then if they win on their appeal  
2 they can come back later and file another action against  
3 Mr. Kovarbasich.

4 THE COURT: All right. Well I think it's probably  
5 time to hear from Mr. Hrko.

6 MR. HRKO: Well, Your Honor, for the same reasons  
7 that the Court found wisdom in holding off ruling on the  
8 motions to remand and motions to dismiss, we--we would like  
9 to be able to run the Kovarbasich issue to the finish line,  
10 so to speak. Yeah, there are other arguments  
11 assuming--let's say the Supreme Court says Mr. Kovarbasich  
12 should be in this case, there are other arguments to remand  
13 and other arguments to dismiss but leaving that one out  
14 there on the island, so to speak and--and then refiling a  
15 case just doesn't--doesn't seem to be the prudent thing to  
16 do.

17 THE COURT: Well I'm not sure that I totally  
18 understand that argument either. Let's see what Judge Kaull  
19 recommended. He--he concluded that the defendants carried  
20 their burden of showing the futility of the proposed  
21 amendment to add Sacchetti as a defendant based on the--the  
22 statute of limitations defense and he then recommended that  
23 the motion for leave to amend be denied therefore.

24 So the--we're not going to add--if I uphold that  
25 recommendation after briefing, we wouldn't be--you all



1 wouldn't be adding Sacchetti as a defendant. Kovarbasich is  
2 still in there until the Supreme--well he would be in there  
3 until the Supreme Court finally said he's not, his Estate is  
4 not. I didn't go back and look at the complaint so you'll  
5 need to refresh my recollection. Is that Estate being sued  
6 on the basis that Kovarbasich was an employee of Consol and  
7 was acting under the direction of Consol at the time that  
8 the alleged events regarding the monitoring system or the  
9 air system occurred when the--the system was dis--allegedly  
10 disabled?

11 MR. HRKO: I would think that would be an argument,  
12 Your Honor, and that would be an allegation.

13 THE COURT: Is it pled that way?

14 MR. HRKO: I'm fairly certain. I haven't looked at  
15 the complaint in a while, Your Honor, but we're fairly  
16 certain it is.

17 THE COURT: Then, Mr. Robinson, I guess my question  
18 to you is, if that is the case, and you may know better than  
19 I certainly, how would Consol be out of this case if I said  
20 they couldn't amend to bring in Sacchetti?

21 MR. ROBINSON: I'm sorry, Judge, I don't understand  
22 the question.

23 THE COURT: Well, if--if Consol is in here because  
24 it's the principal who's responsible for the agent's alleged  
25 actions in this case, if the Supreme Court leaves

1 Kovarbasich's Estate in, I think the case goes back to state  
2 court for any further rulings on motions to dismiss or so  
3 forth, right?

4 MR. ROBINSON: Not correct, Your Honor. Again,  
5 the--the motion to remand, the Court is going to one day  
6 have to address a half dozen other issues relating to  
7 statute of limitations. In other words the--the standard  
8 on--on fraudulent joinder is whether they can possibly have  
9 a--

10 THE COURT: There's no--there's no--with regard to  
11 the Estate of Kovarbasich, there's no motion to amend. He's  
12 in. He's in at this point. He's been pled. The whole--the  
13 whole--the issue that was teed up here was if he couldn't  
14 properly be sued under state law, then the motion to remand  
15 would be denied, but if he is properly sued and he is a  
16 diversity destroying--his Estate is a diversity destroying  
17 defendant, then the case goes back and I think under Fourth  
18 Circuit teaching I wouldn't be ruling on any other issues,  
19 at least as they relate to Consol and Kovarbasich, until  
20 that ruling of the Supreme Court is final, right.

21 MR. ROBINSON: I just don't agree, Your Honor.  
22 The--the--the question of whether the Estate was properly  
23 appointed by the County Commission is but one of many issues  
24 raised in response to the motion to remand and--and under  
25 the standard that we're dealing with under *Mays* is whether

1 there is any possibility that plaintiff would be able to  
2 establish a cause of action against the in-state defendant  
3 in state court and what we're saying is because of the  
4 statute of limitations and other issues addressed in our  
5 memorandum, there is simply no way they can possibly  
6 establish a cause of action against the Kovarbasich Estate  
7 in state court even if--even if our Supreme Court decides it  
8 was properly appointed. So all that means if the Supreme  
9 Court reverses, that's one issue this Court won't have to  
10 deal with. There are a half dozen other issues relating to  
11 remand the Court will have to address in determining whether  
12 or not the plaintiff would be able--plaintiffs would be able  
13 to establish a cause of action against the Estate in state  
14 court.

15 THE COURT: All right. Let's assume I don't agree  
16 with you, Mr. Robinson, and let me ask you if that's the  
17 situation should I go forward with anything else in this  
18 case, such as the R&R, until we have that decision from the  
19 State Supreme Court?

20 MR. ROBINSON: Your Honor, there is one issue  
21 that--that maybe is of great importance right now. Judge  
22 Kaul1 has granted leave to Consolidation Coal Company to  
23 issue subpoena duces tecum to two different people, Larry  
24 Layne and Bonnie Stewart. Mr. Layne has responded to his  
25 subpoena indicating he doesn't have anything responsive to

1 it. Ms. Stewart has--is getting us some of the documents  
2 responsive to the subpoena but is requiring us to file a  
3 motion to compel in California where she resides to get  
4 those items.

5 THE COURT: All right.

6 MR. ROBINSON: So--so--

7 THE COURT: She's--she's the author of the book,  
8 Number Nine, the 1968 Farmington Mine Disaster, right?

9 MR. ROBINSON: Yes, Your Honor, and--and the motion  
10 to compel, there's a strange procedure in California. When  
11 you file a motion in the Central--Central District of  
12 California the parties actually file a joint stipulation of  
13 it so our portion of that joint stipulation of issues,  
14 facts, et cetera, has already been filed. We're waiting for  
15 Ms. Stewart's counsel to get their side together. So those  
16 issues again are wholly unrelated to Judge Marks' order and  
17 any potential appeal of it and we certainly don't want to  
18 interrupt that process this far in. So we want to complete  
19 the process relating to Ms. Stewart before any of her  
20 documents become lost or destroyed.

21 Beyond that--beyond the Bonnie Stewart issues, if the  
22 plaintiffs really want to stay this case, we submit it  
23 should be a complete stay; no more written discovery, no  
24 more affidavits, no more surprise witnesses, no more  
25 depositions of Larry Layne or anyone else. So if they want

1 a stay, let's make it a complete stay, other than the Bonnie  
2 Stewart issue that we have to resolve before  
3 those--those--the documents disappear.

4 THE COURT: All right. Mr.--

5 MR. HRKO: Your Honor--

6 THE COURT: Mr. Hrko.

7 MR. HRKO: Yes. We--we--we understand the issues  
8 with the subpoenas that were issued by--by defendants.  
9 We're also very deep into a process with obtaining the  
10 deposition of Larry Layne. We've been over and around the  
11 mountain to do that. We would also like to at least have  
12 the Court entertain the idea of us continuing that process,  
13 potentially take his deposition as he is a key witness and  
14 as he is--he is advanced in age, along with the subpoenas  
15 the defendants have issued. We are a long way into that  
16 process and as defendants state--state with respect to their  
17 subpoenas, it may be worth it to not stop there but finish  
18 that up while we await the decision of the Supreme Court.

19 THE COURT: All right. Are we all in? Are all the  
20 arguments made?

21 MR. ROBINSON: Bill Robinson, Your Honor. Yes.

22 MR. ZURBUCH: Pete Zurbuch--

23 THE COURT: Sorry, Mr. Zurbuch, what?

24 MR. ZURBUCH: I have nothing further, Your Honor.

25 THE COURT: All right. Mr. Hrko?

1 MR. JEVICKY: Your Honor, this is John Jevicky.  
2 Could we--could we brief this stay issue, so we can set  
3 forth our--I'm sorry, Bill--I'm out--I'm not with Bill but  
4 could we file briefs on why we think the stay should not be  
5 issued and--and why the Court should go forward on the other  
6 two issues?

7 THE COURT: I don't think so, Mr. Jevicky. I think  
8 I understand. I may not agree with everything but I think I  
9 understand. I'm not sure that briefs are going to add much  
10 unless you think you've got a--a case on all fours that  
11 Mr. Robinson hasn't cited to me that you think would heavily  
12 influence where I land on this.

13 MR. JEVICKY: No, I'll defer to Bill. I just--I  
14 tried to e-mail him. I just think that maybe some briefing  
15 would help because of the back and forth on this.

16 THE COURT: I followed it. Thank you. All right.  
17 I'm not going to stay any of the--part of the case related  
18 to the issues that Judge Kaull handled on the R&R. I don't  
19 see any reason why those issues, the briefing and the  
20 argument on the R&R can't go forward and I will take them  
21 under advisement.

22 With regard to the Kovarbasich issue, in light of the  
23 fact that Judge Marks' decision is appealable and I believe  
24 this is not one of those cases that the State Supreme Court  
25 would decide whether it's going to take or not but indeed

1 must take. Please correct me if I'm wrong. You all know  
2 state procedure so much better than I do. This is not a  
3 discretionary decision as to whether the Court will review  
4 this decision, is it?

5 MR. HRKO: Your Honor, plaintiff here. That's our  
6 understanding as well.

7 THE COURT: Yeah. So in light of that and as I see  
8 it, that's a completely separate issue. As of right now  
9 where we would stand on that is that I would--with Judge  
10 Kaull's appropriate handling of this case to this point, I  
11 think while that issue is being resolved whatever discovery  
12 goes on here can continue on the issues of Larry Layne and  
13 Ms. Stewart and--and I'll manage this discovery--any  
14 discovery disputes up to the point where we know what the  
15 State Supreme Court is going to do.

16 I'll further--once that's under way and I receive the  
17 objections on Judge Kaull's recommendation, I'll determine  
18 if I need oral argument and take a look at that and you're  
19 certainly free to add any argument on why I shouldn't rule  
20 on it at this time or why I should rule on it at this time  
21 and what the impact of that would be, but I don't see any  
22 benefit to be gained in staying the rest of this case while  
23 the Supreme Court looks at the Kovarbasich Estate issue.

24 So that's my ruling. I'm going to allow the rest of the  
25 case to go forward and since the Kovarbasich issue isn't

1 before me; it's up above--it's up at the--the Court, I view  
2 the rest of this as informing my judgment on the ultimate  
3 decision on the motion to remand. Okay?

4 MR. SEGAL: Judge Keeley, this is Scott. May I  
5 please ask a question? Scott Segal.

6 THE COURT: Uh-huh (yes).

7 MR. SEGAL: It's not about your ruling. As we  
8 proceed in the state court case would Your Honor like  
9 courtesy copies sent to your Law Clerk of pleadings as  
10 they're filed in the state case merely so that you're aware  
11 of how that is proceeding, what orders or time frames are  
12 being issued by the Court? I know we can't file that  
13 through your federal system but as a courtesy we could  
14 certainly send it to your Law Clerk in Chambers so that you  
15 are apprised of how that case is moving and I just wanted to  
16 know if that's something you would like or would prefer that  
17 we not do?

18 THE COURT: Well, Mr. Segal, I think what I would  
19 like is to be informed as to the ultimate schedule the State  
20 Supreme Court sets for briefing and oral argument but I  
21 think other than that, no. Okay?

22 MR. SEGAL: Understood, Your Honor.

23 THE COURT: I appreciate the offer. Just so I  
24 don't get blindsided by, you know, well we're going to take  
25 two years to decide this, that may bring me back to you all



1 on another telephone call but I--so I think the schedule or  
2 the calendar the Court sets on this would be very helpful  
3 but other than that I don't think it's necessary.

4 MR. SEGAL: I understand Judge, thank you.

5 THE COURT: Okay.

6 MR. ROBINSON: Your Honor, Bill Robinson. We  
7 looked this morning at the Supreme Court's docket, argument  
8 docket for tomorrow and the cases that are on there are  
9 anywhere from 12--the decisions are anywhere from 12 to 16  
10 months old so I think we're probably 12 to 16 months out  
11 from having any oral argument at the Supreme Court and then  
12 obviously another two or three months before any decision.  
13 So we're probably going to push everything back a year and a  
14 half.

15 THE COURT: Well, I understand why you might think  
16 so but you never know and I'll wait to see what the Court  
17 actually schedules. Okay?

18 MR. ROBINSON: All right.

19 THE COURT: So thank you for that though. I  
20 appreciate it. All the more reason why we should go forward  
21 on the rest of the case if we can. So what I'd like to have  
22 from you now is your plan of discovery so that I can set  
23 another conference call with you to approve that discovery  
24 and forestall any battles that may be looming on the horizon  
25 about who can be deposed, when and how long and everything

1 else. If you reach an agreement about your discovery plan,  
2 that would be preferable for me but if you can't reach an  
3 agreement I want to know that and I'm going to carefully  
4 manage this with close supervision to make sure that it  
5 doesn't get bogged down in a lot of discovery disputes  
6 instead of having the discovery actually taken. So what I'd  
7 like to know is if it would be any imposition on all of you  
8 if you could provide me with a proposed or joint agreed  
9 discovery plan by next Tuesday, the 13th of October? Is  
10 there any objection to that?

11 MR. ROBINSON: Bill Robinson. I don't see any  
12 reason why we cannot.

13 THE COURT: Mr. Hrko?

14 MR. HRKO: Same response, Judge.

15 THE COURT: Okay. All right. Then please  
16 consider the order referring discovery to Judge Alois vacated  
17 and discovery will proceed in front of me for the time being  
18 and then once I have your proposed discovery plan, if I need  
19 to, I'll ask my Law Clerk to get in touch with you to  
20 schedule another telephone conference or we will have a  
21 meeting up here where we can sit down and just set a  
22 discovery schedule that works for everybody. Okay?

23 MR. HRKO: All right, Your Honor. Just for point  
24 of clarification, Your Honor, so it is not necessary for us  
25 to--to file a motion to recuse Judge Alois?

1           THE COURT: You know I asked you to do that and I  
2 forgot that I--I actually thought that that might be more  
3 deferential to him. Since I'm going ahead and just grabbing  
4 this, I'll let him know that I vacated that order based on  
5 his prior--you said he previously recused himself in state  
6 court?

7           MR. HRKO: Yes.

8           THE COURT: Okay. I'll let him know that that's  
9 why I went ahead and did that and hopefully he'll understand  
10 and then that's less work for you. I apologize that I  
11 forgot I told you to do that.

12          MR. HRKO: That's all right. And we will--we will  
13 send your Law Clerk a copy of the recusal that he filed in  
14 state court.

15          THE COURT: Okay. Thanks very much. Is there  
16 anything else we need to do today?

17          MR. HRKO: Nothing from the plaintiff, Your Honor.

18          THE COURT: From the--

19          MR. ROBINSON: Nothing from Consol, Your Honor.

20          THE COURT: Okay.

21          MR. ZURBUCH: No, Your Honor.

22          THE COURT: Thanks very much. This Court stands in  
23 recess until one-thirty. Thank you.

24               (The hearing concluded at 1:35 p.m., 10-05-2015)

25

CERTIFICATE

I, Linda L. Bachman, Official Reporter of the United States District Court for the Northern District of West Virginia, do hereby certify that the foregoing is a true and correct transcript of the proceedings had in the above styled action on October 5, 2015, as reported by me by stenomask.

I certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Given under my hand this 13th day of October, 2015.

/s/ Linda L. Bachman

Linda L. Bachman, CCR, CVR-M  
Official Reporter, United States  
District Court for the Northern  
District of West Virginia